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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 111

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

FRANCES G. LEE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 11–12) is not reported. The opinion of the Circuit Court of Appeals is reported in 76 F. (2d) 203 (R. 18).

JURISDICTION

The judgment of the Circuit Court of Appeals reversing the decision of the Board of Tax Appeals was entered March 9, 1935 (R. 19). Petition for writ of certiorari was filed June 7, 1935, and

was granted October 14, 1935. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1919 the respondent, a residuary legatee, sold securities more than two years after the death of her testator but less than two years from the date of distribution to her. Were the securities "held" by the respondent for more than two years so that the gain on the sale thereof is taxable as a "capital net gain" within the meaning of Section 101 of the Revenue Act of 1928?

STATUTE AND OTHER AUTHORITIES INVOLVED

The statute and other authorities involved are set forth in the Appendix, *infra*, pp. 7–13.

STATEMENT

This case involves Federal income taxes for the year 1929 in the sum of $34,523.85 (R. 13). The facts were stipulated (R. 7–11), and as found by the Board of Tax Appeals (R. 11–12) may be summarized as follows:

The respondent is a resident of Littleton, New Hampshire. Under the will of her deceased uncle, George B. Glessner, who died on September 4, 1926 (R. 7), the respondent was made one of his residuary legatees (R. 8–10). On October 6, 1927, the executor of the decedent's estate distributed to the respondent, out of the residue of the estate, 1,550

shares of International Harvester Company and 300 shares of the Commonwealth Edison Company (R. 10).

In 1928 the respondent exchanged the 1,550 shares of International Harvester Company, which had a par value of $100 per share, for 6,200 shares of that company having no par value, and, later, during that year, received 248 shares of the stock of the same company having no par value as a stock dividend upon the 6,200 shares then held by her (R. 10).

The respondent sold in 1929 the said 6,448 shares of International Harvester Company on dates as follows (R. 10):

January 4, 1929, 948 shares.
January 25, 1929, 2,500 shares.
March 5, 1929, 1,000 shares.
September 3, 1929, 2,000 shares.

On September 30, 1929, the respondent, as owner of the 300 shares of stock of Commonwealth Edison Company aforementioned, received rights to subscribe to additional stock of said company, which she sold forthwith for $9,402.18 (R. 10).

The gain arising from the sale of the stock of International Harvester Company referred to above was $372,405.50. The gain from the sale of the rights of Commonwealth Edison Company referred to above was $5,460.62 (R. 11). The amount of such gain was not disputed (R. 11).

The respondent included the gain realized from the sale of the stock and rights above mentioned in her income-tax return for the year 1929 as capital net gain, and computed the tax thereon at 12½ percent of said gain (R. 11).

The petitioner, in his letter of final determination of deficiency for the year 1929, treated the gain as ordinary income and asserted a deficiency in income tax for that year in the sum of $34,523.85 (R. 5).

The Board of Tax Appeals found that the securities hereinabove mentioned had not been held by the respondent for more than two years within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, c. 852, 45 Stat. 791, and determined that there was a deficiency in income tax for the year 1929 in the amount of $34,523.85 (R. 12–13). The Circuit Court of Appeals for the First Circuit reversed the Board of Tax Appeals on the authority of its decision in *First Nat. Bank of Boston* v. *United States*, 76 F. (2d) 200.

SPECIFICATION OF ERRORS TO BE URGED

The petitioner urges that the Circuit Court of Appeals erred:

1. In holding that the respondent, as a residuary legatee receiving personal property upon distribution of the decedent's estate, was to be deemed to have held such property from the date of the decedent's death for the purpose of determining the

holding period, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928.

2. In failing and refusing to hold that for the purpose of determining the holding period, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, the respondent, as a residuary legatee, should be deemed to have held personal property received from distribution of the decedent's estate only from the date of actual distribution to the respondent.

3. In reversing the decision of the Board of Tax Appeals and remanding the case.

ARGUMENT

The question here presented is identical with that presented in *United States* v. *The First National Bank of Boston,* No. 110, October Term, 1935, pending before this Court, and is essentially the same question presented in *Dibblee* v. *Helvering,* No. 494, October Term, 1935; *Rand* v. *Helvering,* No. 439, October Term, 1935; *Ogle* v. *Helvering,* No. 137, October Term, 1935; and *McFeely* v. *Helvering,* No. 24, October Term, 1935, now pending before this Court. In the interest of brevity and to avoid needless repetition, the petitioner adopts and incorporates herein, by reference, the argument presented in the brief filed on behalf of the respondent in the case of *McFeely* v. *Helverig,* No. 24, October Term, 1935, pending before this Court.

CONCLUSION

We respectfully submit that the decision of the Court below was erroneous and should be reversed.

Respectfully submitted.

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OCTOBER 1935.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 811, 815, 818:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

* * * * *

(c) *Definitions.*—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by section 23 other than capital losses and capital deductions.

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

(6) "Capital net loss" means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.

(7) "Ordinary net income" means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions.

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business); but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113 the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property, however acquired, there shall be included the period for which such property was held by any other person, if under the provisions of section

113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

* * * * *

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property;

* * * * *

(2) *Gift after December 31, 1920.*—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or

the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner;

(3) *Transfer in Trust after December 31, 1920.*—If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by a bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made;

* * * * *

(5) *Property Transmitted at Death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall

be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death; * * *.

Treasury Regulations 74:

ART. 596. *Property transmitted at death.*— In the following cases the basis for determining gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the fair market value of the property at the time of the death of the decedent:

(1) Personal property acquired by specific bequest;

(2) Real property acquired by general or specific devise or by intestacy; and

(3) Property, whether real or personal, in the hands of a decedent's estate, acquired by the estate from the decedent (see article 863).

In all other cases where property was acquired either by will or by intestacy after February 28, 1913, the basis shall be the fair market value of the property at the time of its distribution to the taxpayer.

In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the

basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death. Accordingly, if a person is entitled to personal property under such a trust instrument after the grantor's death and if such property would be deemed to be acquired by bequest, other than by specific bequest, were the trust instrument a will, the basis of the property, if acquired after February 28, 1913, would be its fair market value at the time it was distributed to the taxpayer. In all other cases where a person is entitled to property, whether real or personal, under such a trust instrument after the grantor's death, the basis of the property, if acquired after February 28, 1913, shall be its fair market value at the time of the grantor's death.

If the property was acquired prior to March 1, 1913, the gain or loss from the sale or other disposition thereof shall be computed upon the basis provided in section 113 (b) and article 591.

For the purposes of this article, the value of property as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value at the time of the death of the decedent.

S. Rep. 960, 70th Cong., 1st Sess. (p. 26):

Accordingly, the committee has revised section 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general

or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

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